United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-1145

TO BE SUBMITTED
BY: DOMENICK J. PORCO

13
Pgs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

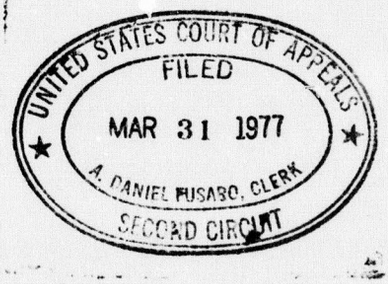
ROBERT ELLIS,

Appellant.

ORIGINAL WITH PROOF OF SERVICE

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DENYING APPELLANT'S MOTION PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

APPELLANT'S BRIEF AND APPENDIX



DOMENICK J. PORCO
Of Counsel

DILLER, SCHMUKLER & ASNESS, ESQS.
BARRY ASNESS
Attorney for Appellant
345 Park Avenue
New York, New York 10022
(212) 371 1400

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

THE UNITED STATES OF AMERICA,

Appellee,

- against -

ROBERT ELLIS,

Appellant.

- X

BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Tenney, J.) entered on January 24, 1977 denying appellant's motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

On August 26, 1976, appellant was sentenced a term of imprisonment of six years to be followed by a four year term of special parole, subject to the provisions of Title 18, U.S.C.A. §4205 (b)(2)*upon his

* The District Court cited former section 4208A(2)However, that statute had been replaced by 4205(b)(2) (P.L.94-233; 90 Stat.219, 1976) which, apparently unbeknownst to the Court, was already in effect. The language in the new section is substantially the same as that in the former section, except that 4205(b)(2) substitutes "release" in place of

(footnote continued on next page)

plea of guilty to violations of Title 21, U.S.C.§812, 841.

Summary of Argument

Appellant will contend that the District Court abused it discretion when, having previously sentenced appellant under Title 18 U.S.C.A.§4205(b)(2) with a view toward early parole release, the Court refused to reduce that sentence notwithstanding the Parole Board's guidelines indicating that appellant would not be given meaningful parole consideration before the expiration of thirty six (36) months of his sentence.

Statement of Facts

On July 1, 1976, appellant Robert Ellis withdrew his previously entered plea of not guilty to indictment number 76 CR 29[illegible] and entered a plea of guilty to counts 3,4 and 5 of the indictment, said counts charging him with violations of Title 21 U.S.C.§812, 841 (a)(1) and 841 (b)(1)(A).

On August 26, 1976 the Court imposed a sentence of six (6) years on each count to run concurrently with each other plus a four year term of special parole. Toward the conclusion of the proceedings the Court stated:

"eligible for parole" found in 4208(a)(2). Appellant is unaware of any authority that has thus fer explained the significance of that change. See Legislative History of the Act.Congressional and Admin.News, 1976, p.567 et.seq. In this brief reference will be made to the new and controlling statute.

> The sentence I imposed under 4208(A). If he behaves himself, he may get an earlier release. (Minutes of sentence, 12-13)(A-18-19)

On September 2, 1976, appellant surrendered to the United State Marshalls to begin serving his sentence and was thereafter transferred to the Lewisburg Penitentiary, Lewisburg, Pennsylvania.

On October 8, approximately four weeks after his commitment, appellant received an initial parole hearing, and on October 20, 1976, he was notified by the Board of Parole that parole was being denied and that he would be "continued" for a "review hearing" in April, 1978. The Board stated its reasons for the denial:

> Your offense behavior has been rated as very high severity. You have a salient factor score of 6. You have been in custody a total of two (2) months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 36-48 months to be served before release for cases with good institutional program performance and adjustment.
>
> After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. (A-34).

Appellant, through counsel, thereafter moved the District Court for a reduction of sentence based on the

---

* A copy of the Board's "Notice of Action" is included in the appendix (A-34). This document was submitted to the District Court as an Exhibit to the Rule 35 Motion and is therefore included in the Record on Appeal.

fact that, inter alia,

> "While sentence was imposed pursuant to 4208 (a)(2) for the purpose of enhancing the defendant's parole eligibility, the Court's ameliorative intent has been thwarted by the action of the parole board.
> On October 8, 1976, Mr. Ellis met with the Parole Board. (Pursuant to the Freedom of Information Act a tape recording of that interview has been turned over to your deponent).
> Mr. Ellis was given a maximum set off of eighteen (18) months and will not meet the Parole Board until April of 1978.
> In addition, Mr. Ellis was informed that the Bureau of Prisons' guidelines for parole eligibility will preclude parole for him until he has served from thirty-six to forty-eight months of his sentence. Mr. Ellis' best efforts within the prison setting to better himself will afford him no relief against the Parole Board's bureaucratic barriers.
> (Affidavit of Martin L. Schmukler, A-22).

The District Court denied the motion without opinion on January 24, 1977. This appeal followed.

ARGUMENT

HAVING SENTENCED APPELLANT UNDER TITLE 18, U.S.C. §4205(b)(2) WITH A VIEW TOWARD APPELLANT'S EARLY PAROLE RELEASE, AND HAVING BEEN INFORMED THAT PAROLE COMMISSION GUIDELINES WOULD NOT AFFORD APPELLANT MEANINGFUL PAROLE CONSIDERATION UNTIL THE EXPIRATION OF 36-48 MONTHS OF CONFINEMENT, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A REDUCTION OF SENTENCE.

At the time of sentencing the District Court had several options available to it under which it could have sentenced appellant. It could have invoked section 4205(a), in which event appellant would not have been eligible for parole until the expiration of one-third of the six year term imposed; it could have invoked section 4205(b)(1) and have designated a minimum term at the expiration of which appellant would be eligible for parole; or it could have invoked, as it did, section 4205(b)(2) which made appellant eligible for parole at any time in the discretion of the Parole Commission.

Of the three available sentencing options, clearly 4205 (b)(2) is the most favorable to the prisoner since, in theory at least, he could be released at any time after commitment. See generally, United States v. Slutsky, 514 F.2d 1222 (2d Cir.,

1974) and Grasso v. Norton, 371 F. Supp. 171 (D.Conn., 1974) (Grasso I) for an exhaustive analysis of these sentencing provisions.

Since"the parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge" (Slutsky, supra, 514 F.2d at 1229) the judge who sentences a prisoner under 4205(b)(2) does so with a view toward giving the prisoner an opportunity to rejoin society at the earliest possible time, depending on his institutional performance. As this Court said in Grasso v. Norton, 520 F.2d 27,33 (2d Cir., 1974)

> The decision of the sentencing judge to impose a [4205(b)(2)] sentence, beside relieving a defendant from the restriction placed on eligibility for parole by section [4205(a)] is an expression of the court's expectations (1) that serious and meaningful parole consideration will be given to the prisoner by the Parole [Commission] at an earlier date than the one-third point of his sentence permitted by 18 U.S.C. §[4205(a)]; and (2) that institutional performance and response to rehabilitative programs will be given due effect by the Parole [Commission] in determining whether parole should be granted.

See also Garafola v. Benson, 505 F.2d 1212, 1217-1218 (7th Cir., 1974).

In this case, Judge Tenney, after considering appellant's background, including the several factors subsequently considered by the Parole Commission in its "Salient Factor" analysis,

decided that appellant was a suitable candidate for the more favorable sentencing provisions of 4205(b)(2):

> If he behaves himself he may get an earlier release.
> (Min. of Sentence, at 13)(A-19)

Obviously, Judge Tenney expected that appellant's institutional performance and adjustment would be the determinative factors in the Parole Commission's decision. Cf., Grasso v. Norton, supra, 520 F.2d at 31, n.8.

However, after an initial parole hearing held two months after appellant's commitment, the Parole Commission denied parole and, contrary to Judge Tenney's obvious intent, indicated that in accordance with its own guidelines, appellant should not reasonably expect to be considered for release on parole before the expiration of thirty-six months of his sentence, a full year more than appellant could have expected had he been sentenced under 4205(a).* See Grasso I, supra; Kortness v. United States, 514 F.2d 167 (8th Cir., 1975). The Parole Commission did indicate that appellant would receive another review in April, 1978, which will be within the one-third period, but given the Commission's guidelines a serious question exists as to how

*Under 4205(a) serious parole consideration would be given to appellant at the end of two years of confinement.

"meaningful" such a review will be.*

Faced with what can only be termed an intolerable position, appellant sought to escape the administrative trap by seeking to have his sentence reduced so that his parole release date, as determined by the Commission's guidelines, would be consistent with Judge Tenney's original intent. United States v. Wigoda, 417 F.Supp.276 (N.D. Ill., 1976); United States v. Jackson, 410 F.Supp.1207 (D.Md., 1976); United States v. Mandeville, 396 F.Supp. 1244 (D. Conn.,1975). Accordingly, the timely Rule 35 Motion, in addition to setting forth appellant's favorable institutional performance,**fully explained his predicament vis a vis parole release.

Mysteriously, Judge Tenney denied the motion in a memorandum endorsement without a word of explanation. In light of the original sentence imposed, which, as already explained, anticiapted, at a minimum, early parole consideration, the denial of the Rule 35 motion is difficult to understand.

We submit that Judge Tenney failed to properly exercise his discretion in this instance, or, in the alternative, he was unaware of, or if aware did not consider, the ramifications of the Parole Commission's guidelines. As a matter of fact,

---

* It has been estimated that the Commission acts within the guidelines in 92 to 94 percent of its decision. Grasso v. Norton, supra, 520 F.2d at 35.

** Appellant has been attending classes while in the institution and has been making considerable progress. (See appellant's letter to counsel dated 12-1-76, at A-29).

(footnote continued on next page)

there is nothing in the record to indicate that Judge Tenney knew, at any time, that the Parole Commission's guidelines would thwart the ameliorative intent inherent in his original sentence. Since his subsequent action in denying the Rule 35 motion is so totally irreconcilable with that intent, the only possible explanation is, as we have suggested, either an abuse of discretion or an unawareness of the relevant facts.

Moreover, as a matter of fundamental fairness, appellant was entitled to some explanation from the Judge for the denial of the motion, for, like the latter, appellant too reasonably expected that his institutional performance would determine his parole status, not some arbitrary administrative process, which, ironically enough, in denying parole employed the very factors that had moved the sentencing judge to grant the (b)(2) sentence.

Thus, having entered the institution with expectations of early release, or at least early parole consideration, appellant has been dealt a cruel blow by both the application of the guidelines and the Judge's refusal to take remedial measures in light thereof. Understandably, appellant has been left with the impression that his best efforts within the institutional setting have been belittled and that regardless of his rehabilitative progress, meaningful parole consideration will not be afforded to him.

In addition, because of his institutional performance, appellant's custodial risk status has been modified from "close custody" to "minimum custody" and is now eligible for transfer to a prison camp outside the confines of the institution.

In addition, the Judge's silence in the face of a clear violation of his sentencing intent lends support to our argument that he did not consider the impact the application of the guidelines would have on appellant's parole prospects. Appellant believes that a statement from the Judge as to his reasons for denying the Rule 35 Motion would have done much to clarify the doubts expressed herein, (cf., United States v. Driscoll, 496 F.2d 252,254 /2d Cir., 1974) and it might well have suggested alternative remedies.

Appellant is fully aware that appellate courts do not, as a rule, require sentencing judges to state reasons for a particular sentence imposed, Driscoll, supra. However, under the circumstances of this case, where the judge's actions are subject to contradictory interpretations, a statement from his as to his reasons for the course of action taken is appropriate. Indeed, because of the lack of explanation from the Judge, counsel, as well as this Court, is forced to engage in a guessing game in an attempt to fathom the judge's rationale.

And, the judges rationale is vital here because if indeed he failed to consider the Parole Commission's guidelines, a remand for resentence is certainly required, Slutsky, supra.

As this Court has said:

> A Sphinx-like silence on the Court's part precludes anyone (including the parties, the judge, and an appellate tribunal) from learning whether /the judge/ acted in error. Furthermore, a statement of reasons by the Court could prove to be of considerable assistance to prison and parole autorities in later determining the type of istitution in which the defendant should be incarcerated and the time and conditions of parole.

United States v. Brown, 479 F.2d 1170,1173 (2d Cir., 1973.)

Finally, since the application of the guidelines to a 4205 (b)(2) prisoner has been held to be illegal, where, as here, the result is to deny him meaningful parole consideration at an appropriate time (Grasso I, supra), by refusing to afford appellant a remedy, and to the extent that he was aware of it, the Court became a party to the illegality.

Accordingly, there must be a remand for resentencing with instructions to the District Court to state his reasons, should he again refuse to reduece appellant's sentence.

CONCLUSION

FOR THE ABOVE STATED REASONS,
THE SENTENCE SHOULD BE VACATED
AND THE CASE SHOULD BE REMANDED
FOR RESENTENCING.

Respectfully submitted,

DILLER, SCHMUKLER & ASNESS, ESQS.
BARRY ASNESS
Attorney for Appellant
345 Park Avenue
New York, New York 10022
(212) 371-1400

DOMENICK J. PORCO
Of Counsel

APPENDIX

TABLE OF CONTENTS

TMF:rs
76-0291

76 CRIM. 0297

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ROBERT ELLIS,
a/k/a "Mule,"

Defendant.

INDICTMENT

76 Cr.

The Grand Jury charges:

1. From on or about the 1st day of January, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Mule,"

the defendant, and others to the Grand Jury known and unknown (hereinafter referred to as the "unindicted co-conspirators"), unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant and unindicted co-conspirators unlawfully, intentionally and knowingly would distribute and possess with intent to distribute heroin and cocaine, which are respectively, Schedule I and Schedule II narcotic drug controlled substances, the exact amount of heroin and cocaine being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

TF:ls
75-0291

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-v- : INDICTMENT

: 76 Cr.

[illegible],
a/k/a "Mule," :

Defendant. :

----------x

The Grand Jury charges:

1. From on or about the 1st day of January, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

[illegible],
a/k/a "[illegible],"

[illegible], the defendant, and others known and unknown (hereinafter referred to as the "unindicted co-conspirators"), unlawfully, willfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of the plan, by that the said defendant and unindicted co-conspirators unlawfully, intentionally and knowingly, would distribute and possess with intent to distribute heroin and cocaine, which are respectively, Schedule I and Schedule II narcotic drug controlled substances, the exact amounts of which are unknown to the Grand Jury at this time, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

3. It was a further part of said conspiracy that the said defendant and unindicted co-conspirators, who were then at least eighteen years of age, unlawfully, intentionally and knowingly, would distribute to persons then under twenty-one years of age heroin and cocaine, the exact amount of heroin and cocaine being to the Grand Jury unknown, in violation of Sections 845, 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about November 13, 1975, ROBERT ELLIS, the defendant, handed to another person a sample of cocaine in the vicinity of the Triple R Variety Store, 287 Lenox Avenue, New York, New York.

2. On or about November 13, 1975, ROBERT ELLIS, the defendant, handed to another person approximately 24.7 grams of cocaine and a jar containing approximately one pound of lactose.

3. On or about December 2, 1975, ROBERT ELLIS, the defendant, handed to another person approximately 26.2 grams of cocaine.

4. On December 23, 1975, ROBERT ELLIS, the defendant received from another person a jar containing approximately one ounce of quinine.

5. On or about December 30, 1975, ROBERT ELLIS, the defendant, received from another person approximately three pounds of quinine.

3. It was a further part of said conspiracy that the said defendant and unindicted co-conspirators, who were [illegible] years of age, unlawfully, intentionally and knowingly, [illegible] twenty-one years of age and older, the exact amount of which is unknown to the Grand Jury aforesaid, in violation of Title 18, United States Code, Sections 545, 512, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about [illegible], the defendant, [illegible] in the vicinity of [illegible], [illegible].

2. [illegible] 13, 1975, [illegible],

[illegible] be [illegible] [illegible] by 84.2

[illegible] [illegible] [illegible] [illegible]

[illegible].

3. [illegible] [illegible], [illegible],

[illegible], [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] of [illegible].

4. [illegible] 23, 1975, [illegible], the de-

[illegible] [illegible] [illegible] for [illegible]

[illegible] [illegible].

5. [illegible] [illegible], [illegible],

[illegible], [illegible] [illegible] [illegible] [illegible]

[illegible], [illegible].

:rs
76-0291

6. On or about December 31, 1975, ROBERT ELLIS, the defendant, paid $825.00 for the quinine he received on December 30, 1975.

7. On or about January 7, 1976, ROBERT ELLIS, the defendant, received from another person approximately three pounds of quinine.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about February, 1975, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Mule,"

the defendant, who was then at least eighteen years of age, unlawfully, intentionally and knowingly did distribute to

a person who was then under twenty-one years of age a Schedule II narcotic drug controlled substance, to wit, approximately one-half ounce of cocaine.

(Title 21, United States Code, Sections 845, 812, 841(a)(1) and 841(b)(1)(A).)

COUNT THREE .

The Grand Jury further charges:

On or about the 13th day of November, 1975, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Mule,"

the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II

A-3

TF:rs
76-0291

6. On or about December 31, 1975, ROBERT ELLIS, the defendant, paid $825.00 for the quinine he received on December 30, 1975.

7. On or about January 7, 1976, ROBERT ELLIS, the defendant, received from another person approximately three pounds of quinine.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about February, 1975, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Yule,"

the defendant, who was at least eighteen years of age, and Kelly, [illegible] did [illegible] to

a [illegible] Schedule II

[illegible] controlled substance, to wit, approximately

[illegible] of cocaine.

(Title 21, United States Code, Sections 845, 812, 841(a)(1) and 841(b)(1)(A).)

[illegible]

The Grand Jury [illegible]:

On or about the [illegible] day of [illegible], 1975, in the [illegible],

[illegible],"

the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II

[illegible] controlled substance, to wit, approximately 24.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 2d day of December, 1975, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Mule,"

the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 26.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

On or about the 7th day of January, 1976, in the Southern District of New York,

ROBERT ELLIS,
a/k/a "Mule,"

the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 17.7 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Foreman

ROBERT B. FISKE, JR.
United States Attorney

narcotic drug controlled [illegible], to wit, approximately 24.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

[illegible]

The Grand Jury further charges:

On or about the 2d day of December, 1975, in the Southern District of New York,

[illegible],

[illegible] unlawfully, intentionally and knowingly did distribute a [illegible] a Schedule II narcotic drug controlled substance, to wit, approximately 26.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

A-5

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE PO ☐ MINOR OFFENSE MO ☐ MISDEMEANOR MIS ☐ FELONY Fel X

JUDGE/MAGISTRATE Assigned: 0844 | Disp./Sentence | 0208 District | 1 Office

U.S. vs. ELLIS, ROBERT a/k/a "Mule"

(LAST, FIRST, MIDDLE)

JUVENILE ☐

Case Filed: Mo. 03 Day 29 Yr. 76 — Docket No. 0297

No. of Defts. 01

U.S. MAG. CASE NO.

OFFENSES CHARGED — ORIGINAL COUNTS

U.S. TITLE/SECTION		ORIGINAL COUNTS
21:846	Consp. to viol. Fed. Narco. Laws.	1
21:845	Distr. of Cocaine,II. Person under 21.	2
21:812,841	Distr. & poss[illegible] of Cocaine,II.	3-5

SUPERSEDING COUNTS

BAIL • RELEASE

☐ Denied ☐ AMT Set ↓ $ 5 000 ☐ Fugitive ☒ Pers. R. ☐ PSA

condit[illegible]

Date

☐ Bail Not Made ☐ Status Changed (See Docket)

☐ 10% De[illegible] ☐ Surety ☐ Collater[illegible] ☐ 3rd Pty Cust

II. KEY DATES & INTERVALS

ARREST or U. Custody Began	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
03-29-76	High Risk Date	Trial Set For	Voir Dire ☐	Disposition of Charges: 8-26-76
Summons Served	Information ☐ 03-29-76	1st Plea: 03-30-76	Trial Began ☐ J ☐ N ☐ J	☒ Convicted ☐ On All C. ☒ On Less Offense
First Appearance	Indict. Waived ☐	Final Plea: 6-14-76	Trial Ended	☐ Acquitted ☐ Dismissed: ☐ WOP:
In Charging District	Superseding Indictment/Info ☐	☐ NG ☐ G ☐ NOL		☐ On Government's Motion
		☐ NG ☒ G ☐ NOL		

MAGISTRATE

	DATE	INITIAL/NO.
Search Warrant: Issued		
Search Warrant: Return		
Summons: Issued		
Summons: Served		
Arrest Warrant Issued		
COMPLAINT ▶		
OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE ▶ — INITIAL/NO.

PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶

☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT

Tape Number

OUTCOME:

☐ DISMISSED

☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:

U.S. Attorney or Asst.: Thomas M. Fortuin, AUSA. (212) 791-1940

ATTORNEYS — Defense: ☒ CJA, ☐ Ret, ☐ Waived, ☐ Self, ☐ None / Other, ☐ PD, ☐ CD

Robert Mitchell

Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DE (a)	(b)
03-29-76		Filed indictment and ordered sealed. B/W ordered. Griesa,J.		
03-30-76		Indictment ordered unsealed. Deft. appears (No Atty.) Court directs entry of not guilty plea. Bail set at $5,000 P.R.B. unsecured. B/W vacated. Case assigned to Tenney,J. Courts appoints Robert Mitchell under CJA. Bryan,J.		
03-30-76		Filed appearance bond- $5,000. P.R.B.		
03-31-76		Filed CONSENT ORDER- deft. is permitted to travel to the State of Florida for business purposes only,etc.Tenney,J.m/n		
04-08-76		Filed Govt.'s notice of readiness for trial. 2 4 13		
04-13-76		Deft&Atty present.Pretrial Conference Held and adjourned until 8/23/76, 10:30 A.M.Tenney,J.		
04-14-76		Filed CONSENT ORDER-Deft granted extension of time to make any any motions to 4/23/76.Tenney,J.		
04-15-76		Filed Bench Warrant on 3/29/76 and executed same.		

FORM AO-256

A

A-6

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW. IN SECTION V. ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY Interval (a)	Start Date End Date (b)	Ltr. Code (c)	Total Days (d)
04-15-76	Filed Remand with Marshal's return: Deft released from custody of U.S.Marshal upon posting of bond in sum of $5,000.				
04-23-76	Deft. (atty. present) pre-trial conference held. 2 weeks for motions and 5 days for respondums by the Govt. trial set for 6-14-76. Tenney,J.	2.	4-23	E	1
06-14-76	Filed deft's acknowledgment of constitutional rights.				
06-14-76	Deft. (atty. present) withdraws plea of not guilty to cts 3,4 & 5 and pleads guilty to cts 3,4, & 5. Pre-sentence investigation ordered. Sentence adj.'d until 7-27-76. Deft. remanded - no bail.Tenney,J.				
07-01-76	Deft.(atty. present) bail application is granted. Deft. remanded in lieu of bail fixed in the sum of $25,000. unsecured P.R.B. to be secured by deed of property in Fla., deed to be posed before the deft. is released. Tenney,J.				
07-02-76	Filed $25,000. personal recognizance bond.				
07-02-76	Deft. (atty. present) bail conditions changed, bail now $25,000. P.R.B. to be co-signed by Joshua A. Aska. Tenney,J.				
07-22-76	Filed remand dated 7-2-76 deft. released upon posting $25,000. Unsecured bond.				
08-18-76	Filed Order expanding bail limitations to include travel between the SDNY and S.D. of Fla. between 08-09-76 and 08-13-76. So Ordered. Tenney J.				
08-25-76	Filed Govt's sentencing memorandum.				

	08-09-76 and 08-13-76. So Ordered. Tenney,J.
08-25-76	Filed Govt's sentencing memorandum.
08-26-76	Filed Judgment (atty. Martin L. Schmukler) Cts.3,4 &5- 6 years impr. ea. ct. conc. S.P. 4 yrs. 21:841. Parole 4205(b)(2). Deft. is cont'd. on his present bail until 10AM. 9-2-76, at which time he is to surrender to the U.S. Marshal. Cts. 1 & 2 are dismissed on deft's motion. Tenney,J. issued all copies.
09-09-76	Filed J & C, deft. delivered to M.C.C. 9-2-76.
12-13-76	Filed transcript of record of proceedings, dated 8/26/76
01-05-77	Filed letter from deft's atty.dated 12/27/76 re:enclosed documents relevant to motion of 12/14/76 which were inadvertently omitted.
12-21-76	Filed deft's notice of motion re: reduction of sent.
01-14-77	Filed memo-end. on motion docketed 1-14-77. Motion denied. Tenney,J. m/n
02-08-77	Filed deft's notice of appeal from order of 1-26-77 denying motion for reduction of sent. Mailed copies to deft. and U.S. Atty.

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

BY: _____
Deputy Clerk

II

A-7

bbklm

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

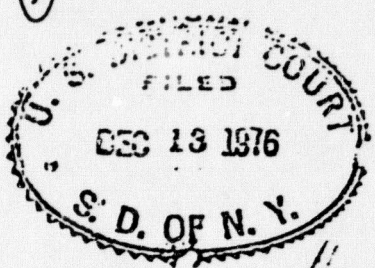
Plaintiff, :

vs. : 76 Cr 297

ROBERT ELLIS, :

Defendant. :

----------x



BEFORE:

HONORABLE CHARLES H. TENNEY,
District Judge

New York, New York, August 26, 1976, 10:30 a.m., Rm. 312

For the Government: THOMAS M. FORTUIN, ESQ.

For the Defendant: MARTIN L. SCHMUKLER, ESQ.

- - -

THE CLERK: USA versus Robert Ellis.

Is the Government ready?

MR. FORTUIN: The Government is ready.

THE CLERK: Is the defendant ready?

MR. SCHMUKLER: The defendant is ready.

your Honor.

THE COURT: Mr. Ellis, is there anything you want to say before the Court imposes sentence?

THE DEFENDANT: I'm asking you to be lenient with me, sir. I want to be able to take care of my family.

THE COURT: Why do you think I should be lenient with you?

THE DEFENDANT: I believe I've been a good man, sir. I did something wrong.

THE COURT: I take it that you've read the pre-sentence report, Mr. Schmukler?

MR. SCHMUKLER: Yes, I have, your Honor.

THE COURT: And I have read the pre-sentence report also or the pre-sentence papers that you submitted.

MR. SCHMUKLER: I believe Mr. Fortuin has submitted a pre-sentence memorandum to your Honor as well.

THE COURT: Yes. Did you get a copy?

MR. SCHMUKLER: Yes, I did, your Honor.

THE COURT: Is there anything that you want to say on behalf of the defendant?

MR. SCHMUKLER: Yes, there is, Judge.

I think I prefer to emphasize the positive this morning. I think your Honor has clearly seen the pre-sentence report that I have submitted and that the probation department, that did their own independent investigation, has reached virtually the same conclusion that at the very least, Mr. Ellis has been a family man. He's seen to it that those who are dependent on him, however hard or heavy the burden on him, at least they didn't go hungry.

I know that during the time that your Honor allowed him to remain out on bail pending sentence, he's made efforts to assure that there will be some income coming into his family so that his dependents will be taken care of in the event your Honor should impose a term of incarceration here.

I don't say that so that your Honor should feel that should a man go away everything will be okay. Everything won't be okay. It's not going to be easy for anyone if your Honor imposes a period of incarceration here.

I recognize that's probably true in every case where a man has dependents and has to go away. What can we say? It's too bad.

I recognize there is a certain amount of

punishment necessary, a certain amount of deterrent effect to be employed, and those considerations often overtake the considerations of leniency.

I'm not sure that that should be the case here to any extraordinary degree. Particularly, since it's clear that, while at liberty and for all of his adult years, he's always seen to his obligations of the family in a very responsible fashion.

They are here today, both his former wife and the lady whom he now considers his wife. He has children by both of them, and neither one of them would ever tell you he ever let them go hungry.

His mother is present in court. I think your Honor also sees present in court Mr. Sumpter who spoke to your Honor when we made our bail application approximately seven weeks ago, and Mr. Bird is also here.

He even enjoys support in the community. Your Honor has in the report the letters of a number of business people in the community who have had business dealings with the defendant.

THE COURT: Yes, I have seen those letters.

MR. SCHMUKLER: I suggest, your Honor,

that the --

THE COURT: The pre-sentence report reflects the fact Mr. Sumpter has preferred to contact the probation authorities and tell them of Mr. Ellis' generous financial and personal help in their programs and activities. I do not believe they condoned his illegal activities.

MR. SCHMUKLER: Nobody in this courtroom condones it, your Honor, not even the defendant. He's the first to recognize that he's done some serious wrong, but for every bit of wrong he's done, there has been some considerable countervailing good, and I think when a man reaches this stage of life -- he's 38 years old -- his best years are still ahead of him.

The people he needs and loves, and people that are dependent on him are still loyal to him. He still has a wonderful family who are devoted to him, to whom he is equally devoted.

It would be a pity to take that away from him for a period of time where those kind of relations could be weakened.

THE COURT: There are a lot of people who are also hurt by this type of traffic that he engaged in. You are aware of that, and I'm sure the

bbklm

community is aware of it.

MR. SCHMUKLER: I know that, Judge. The principal part of the illegal activity that was attributed to this defendant was in the area of cocaine.

THE COURT: He may have taken care of his own family. He may have destroyed how many other families. We don't know.

MR. SCHMUKLER: Judge, I suggest on the question of use of the drug cocaine, the defendant himself has been a user of that durg. The jury is still out, and they are rapidly on the path to returning a verdict that is not as harmful as Congress and many of our set legislators have said it is.

THE COURT: When they tell me otherwise --

MR. SCHMUKLER: I know that, Judge. I don't talk to you as if I am speaking to a congressman or a legislator. I recognize that, but many judges have taken it into consideration that the penalties for one drug should not necessarily be applied where the offense is of a different drug. The difference has been drawn in many a courtroom, and many a judge in this court house, that one is simply not as harmful as the other. I don't say this defendant should get leniency because of that distinction.

bbklm

There has been a substantial measure of what I consider mischaracterization, perhaps exaggeration of what the defendant's activities were in that regard. When I say this, your Honor, I'm addressing myself to what has been said by Mr. Fortuin on at least two previous occasions, and is now reiterated again in the pre-sentence report.

There is suggestion that the defendant was too close to a particular homicide that occurred out in front of his store. Well, the defendant was never a suspect in it. No one ever considered that he might be responsible, and Mr. Fortuin or nobody else is saying that he is responsible.

It maybe a happenstance that happened out in front of his store, but I don't think it would be permissible and fair to draw any inference of the defendant's involvement simply because it occurred there.

What occured following that --

THE COURT: I'm not sentencing him on anything other than the crimes that he's pleaded guilty.

MR. SCHMUKLER: I appreciate that, your Honor, because I think it narrows the field considerably because some of the statements made, and they do appear in the probation report as well, create the impression

that this defendant has acquired a business and interest in narcotic activities, and nothing can be further from the truth.

Were it not for the fact that the defendant was in a very, very weak financial position, he perhaps would never have gotten involved at all.

This period of involvement was a rather brief one. Had there been a trial in the case, your Honor would have observed the fount of the source of much of this exaggerated commentary about the defendant's activities.

I think your Honor would have concluded that at least the defendant is perhaps guilty of what he has pleaded to, but the other activities simply have been placed well out of proportion.

The particular individual with whom this defendant had activities with that resulted in his plea of guilty in this courtroom is a former employee, a man that was fired from the store for stealing.

Although he fired this man for stealing, he didn't necessarily feel that he should be clubbed for his misconduct or sent to jail for it. Nonetheless, he tried to help him thereafter.

His efforts to help the man were perhaps just what brings him into this courtroom today.

I don't think, Judge, as you look at this man, if you were to speak to him for any length of time, you would come to the conclusion he's at all [illegible] sinister or evil or capable of any violence. The only narcotic [illegible] offenses in his background were dismissed, and they were an extremely minor nature.

The only offense involving any violence of any sort was one in which the defendant himself was a victim.

In addition, in the probation report there is mentioned that there is an outstanding warrant for the defendant. That to my knowledge is not true.

There was a charge of that nature [illegible] lodged against the defendant by a person who had actually shot this man. I think you may recall when the defendant displayed his wound in the courtroom on the day he was remanded following his plea of guilty, and I found out quite a bit about that particular incident.

What happened was that man shot this defendant, and believing that this defendant might complain to the authorities about it while he was confined in the hospital, to play it safe had the defendant

charged with reckless endangerment.

Thereafter that particular individual never went back to the court house to pursue the complaint, and the defendant himself ultimately appeared, and the charge was dismissed.

So, as far as the defendant's prior background, there have been some offenses of larceny, but that's a long time ago, and the defendant is well out of that stage in his life, and there is no likelihood that an offense of that nature might ever occur again, and I think everything shows that the defendant is on the road to recovery.

He had this just unfortunate episode involving the offenses that took place here, and I say with a considerable degree of confidence that if your Honor showed leniency to this defendant, your leniency would not at all be misplaced.

On behalf of this defendant, I urge your to do that.

THE COURT: Anything further, Mr. Ellis, that you want to say?

Very well. I have studied the presentence report in considerable detail, and letters that have been received, and the material that was

bbklm

furnished by Mr. Schmukler and a memorandum that was submitted by the Government.

I have taken into consideration the good part of the man as well as what could be clasified by me as the bad side of the man, namely, his involvement in this traffic.

It's adjudged that on Counts 3, 4, and 5 the defendant be submitted to the custody of the Attorney General or his authorized representative for imprisonment for a term of six years to run concurrently. The remaining counts I assume --

MR. SCHMUKLER: I request them to be dismissed.

THE COURT: The remaining counts are dismissed.

No objection from the Government?

MR. FORTUIN: No objection, your Honor.

Your Honor, under the law you are required to impose --

THE COURT: In addition to the term of imprisonment imposed, there will be a special four-year parole to commence upon the completion of the prison sentence. And I will set a date to surrender, or what is the Government's --

bbklm

MR. FORTUIN: I believe the defendant should be remanded at this time. He's been given several months to conclude his business affairs. Mr. Schmukler asked us last week if he might have an opportunity to travel to Florida to dispose of his business there, and we consented to that, and he has done that.

As I understood it, his release pending sentence, as you recall those proceedings, was specifically so he could prepare if he were incarcerated to be remanded at this time. Certainly that's my motion.

I think on the basis of the facts of this case, on the basis of his guilty plea, he is a danger to the community, and he should be remanded.

MR. SCHMUKLER: There has been no instance of any illegal activity on the part of the defendant since his --

THE COURT: No, but --

MR. SCHMUKLER: I'm not suggesting that he should have an extended period of liberty. I think he should like to have a few days to take a last look around and say his goodbyes.

THE COURT: The sentence I imposed under

4208A. If he behaves himself, he may get an earlier release. I'll give him one week to surrender, and don't let me down.

MR. SCHMUKLER: I won't ask you for anymore, Judge.

THE COURT: We'll take a short recess.

THE CLERK: That will be at 10:00 a.m.

THE COURT: 10:00 a.m. a week from today in the Marshal's office.

THE CLERK: The court will take a short recess.

- - -

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Barbara Koehler
Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA	:	
-against-	:	NOTICE OF MOTION FOR REDUCTION OF SENTENCE
ROBERT ELLIS, Defendant.	:	Indict.No.76Cr.297(CHT)

S I R :

PLEASE TAKE NOTICE that upon the annexed affirmation of MARTIN L. SCHMUKLER, Attorney for the above-named defendant, and upon all prior proceedings herein, a motion will be made before this Court (Tenney, J.) on the 23 rd day of December, 1976, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 35 of the Federal Rules of Criminal Procedure, reducing the sentence heretofore imposed upon defendant, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
December 21, 1976

Yours, etc.

DILLER, SCHMUKLER & ASNESS, ESQS.
MARTIN L. SCHMUKLER
Attorney for Defendant
345 Park Avenue - 21st Floor
New York, New York 10022
(212) 371 1400

To: U.S. Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York 10007

Attention: Thomas Fortuin, A.U.S.A.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

-against-

ROBERT ELLIS,

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MARTIN L. SCHMUKLER, being duly sworn, deposes and says:

1. I am the attorney for the above-named defendant and I am fully familiar with the facts and circumstances surrounding this case.

2. On August 26, 1976 Your Honor sentenced the defendant herein to six years imprisonment with a four-year special parole term to follow, subject to the provisions of Title 18 U.S.C. §4208 (a) (2) upon his plea of guilty to violations of the federal narcotics laws.

3. The defendant is now serving his sentence at the Lewisburg Federal Penitentiary. He is required to serve his sentence at a penitentiary rather than a minimum security Federal Correctional Institution because his sentence exceeds five years.

Since arriving at the institution the defendant immediately took up employment in the mail room and he has also taken full advantage of educational programs available to him and is attending school daily. His institutional adjustment has been exemplary. Indeed, on Friday, December 17, Mr. Ellis was informed that his custodial risk status has been modified from "close custody" to "minimum custody", and by virtue of his good institutional

performance he is eligible for transfer to the Lewisburg prison camp outside the walls.

While sentence was imposed pursuant to 4208 (a) (2) for the purpose of enhancing the defendant's parole eligibility, the Court's ameliorative intent has been thwarted by the action of the parole board.

On October 8, 1976 Mr. Ellis met with the Parole Board. (Pursuant to the Freedom of Information Act a tape-recording of that interview has been turned over to your deponent.) Mr. Ellis was given a maximum set off of eighteen months and will not meet the Parole Board until April of 1978. In addition, Mr. Ellis was informed that the Bureau of Prisons' guidelines for parole eligibility will preclude parole for him until he has served from thirty-six to forty-eight months of his sentence. Mr. Ellis' best efforts within the prison setting to better himself will afford him no relief against the Parole Board's bureaucratic barriers.

Your deponent has annexed hereto some of Mr. Ellis' correspondence for the Court's consideration. I have also spoken on numerous occasions with Sandra Melville who manages the defendant's variety store and whom the defendant now plans to marry, and I have learned that the defendant's former wife has been derelict in caring for the defendant's children. Monies furnished to her at Mr. Ellis' direction are not being applied to rent, utilities, clothing and food and the defendant is deeply distressed and disturbed over the deteriorating conditions. These conditions did not exist when the defendant was at liberty.

Because of the Parole Board's restrictions only this Court can provide relief to the defendant, and on behalf of the defendant your deponent respectfully urges the Court to adjust the defendant's punishment by taking these new factors into account.

Accordingly, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the defendant moves for a reduction or modification of sentence.

No previous application for the relief sought herein has been made.

Sworn to before me this
21st day of December, 1976

MARTIN L. SCHMUKLER

Mr. Schmukler & Assocs
45 Park Ave 21st flor
New York N.Y. 10022
Att: Martin L. Schmukler
9/21/76

Sir I am Writing you to let you
Know How I Am Doing, I Arrive 9/13/76.
I donate my Cloth to Needy inmate that
do Not have Any Cloth to Wear home.
I Am in Admission Orenation that Consist
of lectures, Psychological Testing And Medical.
Yes I Am Worrying About My Families And it
is hard for them to Visit me.
Yes I make two Call A Week.

Yours truly
Robert Ellis
C3185-158-A-D

Mr. Schmukler & Ramers
45 Park Ave 21st Floor
N.Y.C. N.Y. 10022
Mr. Martin L. Schmukler
1/27/76

Sir I am Writing You to let You know how I am progessing, I have move out of Admission & Orientation been Classify, to Work in mail room, to go school, take up some kind of Vocational Training. Ho of so I can get a diploma.

My Status is Close Custody, that is because stealing Car that is open, but it was dismiss 1972,

Mr. Schmukler I am Worring about my family long time to hope everything be all right when I get out. And I am sorry that I get involve Drug.

And I cannot get no tranfer Close to me at least One year an half.

Yourly Truly
Robert Ellis

New York New York 10022

Att. Martin L. Schneider

10/2/76

Sir I saw the Parole Board on 10/8/76
And they said that Judge Gave me a six year
Adult sentence with And A-2 Or B-2 Number
She said that Mean Judge Jenny want me
to do one third And be release on Parole
Provide I kept A good institution record
But Sir the parole Examiner said that do
Not go for me. That is not my Guideline
my is thirty six months to forty Eight Months.
That is determining by the Sentencefact
Which is like the presentence report And
Judge Jenny he Read that And Came up with
six year And A-2 Number, then they Read it
And Come up with 36 months to 48 months. So the
A-2 Number is no good, Are they Are not
Abiding by the Judge decision
So I Am going to write Judge Jenny
And tell him how I Am doing And About
Parole board Sentence.
Yes I Am Worry About my family And
sorry that I get involve in drug.
Mr Schneider I miss And I
Want to get Marry when I Am in
Jail, Can you get back to Mr C C so
We Can get Marry before X mas.
Thank you.

Robert Ellis

Mr. Edwards-9 Annex
Attorney At Law
345 Park Ave.
N.Y.C. N.Y. 10022
11/21/76

Sir I Am writing you today feel very down
I Can't think of the future, And it look very bad for me.
Sir I haven't heard from Beverly, I have wrote
her three times And Ask her to let me know the Children
We have been Apart for Six year, But I stay close to my
Children. Sandra said she will not pay the rent
So I told Sandra to pay the rent And Collect As they
Be she Came.
Sir My Brother will Get Sandra the rent money
that he Get from the building in Ala., So the mortgage Can
be pay. So I Am trying to get the building Change Over-
to Sandra, Sandra trying to hold everything together
Sir I Am very sorry that I was sell Crime And
Also that I Am send my Children this way
Sir this is very severe Sentence, I Can't lose
every thing that I have, And I Realize that I should
have thought of this before I get in to trouble And
I Am Sorry that I did it
Sir I have put in request to see the psychiatrist
because it is hard for me Sleep, I stay Awake All
three Four A Night, But it is wrong I think

Yours truly
Robert Ellis
03185-F-2

Miller Schmeltz & Weiss
Attorneys At Law
345 Park Ave.
New York N.Y. 10022
11/5/76

Sir

I Am progressing very good, on school And on the Job But my Custody is the same Close,

Mr. Schmeltz this is severe punishment that I Am being through I keep stressing About my family, I try not to but I love my family so I Can not stop. Plus I Havent heard from Beverly to find out how the Children Are doing. Plus Mel Belkin the real estate Agency, told Sandra that Beverly let Another tenant rite the Apartment but Mr. Apartment to there. But I told Sandra to Continue to pay Con Edison, Because My Children would be the ones that will be hurt, by not paying the bill.

Sir I sented you some information Concerning the Parole Board, And I will send you some more.

Your Truly
Robert Ellis
03185-F I

Adler Schmutter & Acnes
Attorneys At Law
345 Park Ave 21st fl.
New York N.Y. 10022
12/1/76

Robert Ellis
P.O. Box 1000.
Lewisburg Penna.
17837

Sir

I am still going to school, and working in the mail room. My grade in school is good, and English my average is Eighty Six.

Sir I would appreciate if you would let the Court know that I am sorry that I was selling small Amount of Cocaine, And I am through with that. And Also for Put my family through this Ordeal.

Sir This trip down here it is Jet Sandra, she be on the bus five hour here, and five hour back. And she have to go work went she get back, And there's Nothing.

Sir I would like to come back to M.C.C. And get Home before Xmas.

Thank You.

Your Truly
Robert Ellis
03185-F-2

Leiter Schmukler & Aeces
Attorneys At Law
345 Park Ave
New York N.Y. 10022
12/16/76

Sir-

I am progressing fine, I am still going to school day, and Night and still work in the Mail Room.

Mr Schmukler I have Problem With prostate Gland, And I told the doctor Nurse at 17th. And he preferred to an other Doctor, And I havent been able to see the other Doctor. I been to hospital three time And I havent seens Dr. Stallworth yet. And doctor Lucas told her that it was serious, that everytime that I move My Bowel I discharge. I am going to try And see the hospital Administrator Monday 12/20/76, And See Can he Arrange for me to see the Doctor, And they dont have but two doctor for fourteen Hundred inmate.

Mr Schmukler I am going to Write Judge Leary Next Week 12/13/76

Your Truly
Robert Ellis
C3185-F

Ellis, Schwukler & Caress
Attorneys At Law
345 Park Ave
New York N.Y. 10022
12/1/76

Robert Ellis
P.O. Box 1000
Lewisburg Penna

Sir

I Am Progress find, And I am Still going to school day, and night. And I Am Still working in the Mail room.

Mr. Schwukler My Custody Will be Change from Close Custody to Minimum Custody. The Case worker told me Friday Dec. 17, Ask me did I want to go to farm that Minimum Security Camp, Outside the Wall.

So Mr. Schwukler, I dont Care how god I be here But not going to Change the parole board, About a early parole.

I Will Call you Wed.

Your Truly Robert Ellis

A-32

DILLER, SCHMUKLER & ASNESS
ATTORNEYS AT LAW

345 PARK AVENUE
21ST FLOOR
NEW YORK, N.Y. 10022
(212) 371-1400

HOWARD J. DILLER
MARTIN L. SCHMUKLER
BARRY ASNESS

December 27, 1976

Honorable Charles H. Tenney
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: U.S.A. vs. Robert Ellis,
76 Cr. 297

Dear Judge Tenney,

On December 14, 1976 I submitted a motion for a reduction of sentence on behalf of the above-named defendant. The enclosed documents are relevant to the motion and should have been annexed to the moving papers but were inadvertently omitted.

I most respectfully request that Your Honor consider these documents in your determination of the motion.

My apologies for any inconvenience my oversight may have caused.

Respectfully yours,

MARTIN L. SCHMUKLER

MLS/djp
Encs.

cc.: United States Attorney
1 St. Andrew's Plaza
New York, New York 10007

Attention: Mr. Fortuin, A.U.S.A.

BUREAU OF PRISONS

A-33

SENTENCE COMPUTATION RECORD

EGISTER NO.	2. NAME (LAST, FIRST, MIDDLE)	3. INSTITUTIONS OF CONFINEMENT IN SEQUENCE (SYMBOLS)	
185-158	ELLIS, Robert	LEW	
ATE OF BIRTH (MO., DAY, YR.)	5. FBI NO.	6. RACE 1. WHITE 2. BLACK 3. YELLOW 4. RED 5. OTHER	7. SEX 1. MALE 2. FEMALE
-25-38	429 897 C ARB.	2	1

ENTENCE NUMBER	1	DOCKET NO. 76-297
ATE PREPARED OR CHANGED	09-30-76	
ATE SENTENCED	08-26-76	
ATE COMMITTED Y FOLLOWING METHOD	09-13-76	INST. SYMBOL LEW
OW COMMITTED	LEW	
ISTRICT	02323	S-NY
UDGE	TENNEY, C.H.	
FFENSE	21-841 DIST NARC S-II	
OF OFFENSE CODE	381	
ENTENCE PROCEDURE	13	4205(b)(2)
ENTENCE IMPOSED YEARS = LIFE DEATH	06-00-00	6 years
EW TERM OF THIS ENTENCE	*	
ASIS FOR CHANGE	*	
INE/COSTS: COMM. = 1 NOT COMM. = 2	*	
ROBATION: REVOKED = 1 TO FOLLOW = 2	*	

	TOTAL	FROM & INCL.	TO & INCL.
AIL CREDIT	0020	03-30-76	03-30-76
		06-14-76	07-02-76
NOPERATIVE TIME	*		
DENTIFY SENTENCES INCLUDED IN FOLLOWING SENTENCE COMPUTATION(S) BY SENTENCE NUMBER(S)	1		

TOTAL TERM NOW IN EFFECT	06-00-00	6 years
SENTENCE BEGAN OR WARRANT EXECUTED	09-02-76	
EXPIRES FULL TERM	08-12-82	
FULL TERM LESS 180 DAYS	02-13-82	
GOOD TIME ALLOWANCE AND RATE	00768	@ 08 DA/MO
MANDATORY RELEASE OR EXPIRES WITH GOOD TIME	07-05-80	
ELIGIBLE FOR PAROLE	66-66-66	(b)(2)
SPECIAL PAROLE TERM	04-00-00	YEARS

2/3: 08-12-80

REMARKS

entence stayed until 09-02-76

PL

Parole Form H-7(a)
(Rev. June 1974)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

A-34

Notice of Action

Name Robert ELLIS

Register Number 03185-158 Institution Lewisburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered: CONTINUE FOR STATUTORY REVIEW HEARING IN APRIL, 1978.

Conditions or remarks:

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 6. You have been in custody a total of 2 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 36-48 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. 18 U.S.C. 4208 prohibits a continuance in your case of more than 18 months without review. Your next review has been scheduled in accordance with this statute.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

Oct 20, 1976 (Date Notice sent)

Northeast (Region - Specify)

mlc (Docket Clerk)

National Appellate Board (Check)

INMATE COPY

R-2 part 2
(Rev. 8/75)

A-35

NOTICE OF ACTION - PART II - SALIENT FACTORS

Case Name Robert ELLIS Register Number 03185-158

Item A ---------- 0

No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B ---------- 0

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C ---------- 1

Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D ---------- 1

Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E ---------- 1

Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise - 0

Item F ---------- 1

No history of heroin or opiate dependence = 1
Otherwise = 0

Item G ---------- 0

Has completed 12th grade or received GED = 1
Otherwise = 0

Item H ---------- 1

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I ---------- 1

Release plan to live with spouse and/or children = 1
Otherwise = 0

---------- 6

A-36

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
- against -	:	NOTICE OF APPEAL
ROBERT ELLIS,	:	Ind. No.
Defendant.	:	

S I R :

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the United States Court of Appeals for the Second Circuit from an order of this Court (Tenney,J.) entered January 26,1977 which denied defendant's motion for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

DATED: New York, New York
February 1,1977

Yours, etc.,

DILLER, SCHMUKLER & ASNESS, ESQS.
MARTIN L. SCHMUKLER
Attorney for Defendant
345 Park Avenue
New York, New York 10022

TO: ROBERT FISKE
U.S. Attorney
1 St. Andrews Plaza
New York, New York 10007

ROBERT ELLIS
P.O. Box 1000
Lewisburg, Penn. 17837

MARTIN L. SCHMUKLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

THE UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT ELLIS,

Appellant.

- X

AFFIDAVIT OF SERVICE BY MAIL

Docket No. 77-1145

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

SUSAN DE PINTO, being duly sworn, deposes and says:

1. That she is not a party to the action, is over the age of eighteen years, and resides at 2124 Bruckner Blvd, Bronx, New York.

2. That on the 31st day of March, 1977 she served three (3) copies of Appellant's Brief and Appendix in the above-entitled case upon the United States Attorney, for the Southern District of New York, by enclosing same in a properly addresssed, post paid envelope and deposited same in an official depository fo the United States Post Office within the State of New York.

SUSAN DE PINTO

Sworn to before me
this 31st day of March, 1977

[illegible]
COMMISSIONER OF DEEDS
CITY OF NEW YORK 3-1075
Commission Expires Nov. 1, 19[illegible]